No. 16162

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CRISTOBAL G. PADILLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE W. KELL,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 16162

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CRISTOBAL G. PADILLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

A. Statement of Jurisdiction.

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of two counts of an indictment involving other co-defendants. All counts in the indictment involved violations of Title 21, United States Code, Section 174. The violations occurred in San Diego, Imperial, Los Angeles, and Orange Counties, State of California, and within the Central Division of the Southern District of California.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

B. Statement of the Case.

The indictment, in five counts, was filed on March 13, 1957, essentially charging the appellant and his co-defendants, Antonio Espinoza Ramos and Isaac Gomez Gomez with violations of Title 21, United States Code, Section 174, as follows:

COUNT ONE: On February 4, 1957, defendant Ramos sold and facilitated the sale of approximately 343 grains of heroin and 5½ ounces of smoking opium.

COUNT TWO: On February 7, 1957, defendant Ramos sold and facilitated the sale of approximately 26 ounces of smoking opium.

COUNT THREE: On February 20, 1957, defendant Ramos received, concealed, and transported and facilitated concealment and transportation of 9½ ounces of heroin.

COUNT FOUR: On February 20, 1957, defendants Gomez and Padilla received, concealed and transported and facilitated concealment and transportation of 25 ounces of heroin.

COUNT FIVE: Beginning February 4, 1957, and continuing to the date of the indictment, March 13, 1957, defendants Ramos, Gomez and Padilla conspired to import narcotic drugs and, after importation, to conceal, sell, transport and facilitate concealment, sale and transportation of narcotic drugs. In this count, among other overt acts, it is alleged that Gomez and Padilla facilitated the transportation and concealment of approximately 25 ounces of heroin.

The trial court, sitting without a jury, dismissed count one at the conclusion of the government's case in chief [T. 452] and, on May 6, 1957, found the defendant

Ramos guilty on counts two, three, and five, and defendant Gomez and appellant were each found guilty on counts four and five [T. 1001, 1002].

C. Statement of Facts.

The case was called for trial on April 23, 1957, the Honorable Harry C. Westover, Judge, presiding. An interpreter was sworn, and remained present throughout the trial [T. 3]. Each defendant, by his attorney, and individually, waived trial by jury [T. 4].

Inasmuch as this appeal is made by only one of the defendants it is deemed appropriate to focus attention to those facts pertaining to the appellant Padilla. However, an understanding of Padilla's part in the case necessarily involves some analysis of the initial negotiations leading up to his arrest, although he did not participate directly in those negotiations.

The first contact made with any of the defendants was by R. S. Cantu, an agent of the Bureau of Narcotics. Cantu met Ramos in Calexico, California, on February 4, 1957 [T. 8]. Ramos was introduced to Cantu as "David Trevino" [T. 10]. A sale of heroin and opium was consummated at this meeting for a total of $475 of government advanced funds [T. 19]. Cantu specified that all future deliveries of narcotics would have to be made in the vicinity of Los Angeles [T. 16]. They discussed the prices that would be paid for future deliveries [T. 17] and Ramos said that he had "big connections" in Mexicali [T. 18].

On February 6, 1957, Cantu and Ramos had a telephonic conversation [T. 38] in which Ramos told Cantu that he had a better proposition [T. 42] to offer Cantu. Ramos indicated that "his boss" had a better proposition to offer Cantu [T. 43].

Cantu and Ramos next met on February 7, 1957, in Anaheim at the Valencia Hotel [T. 44]. At this time Ramos referred to "some cousin of his or some friend of his" who was bringing narcotics from Culiacan, Sinaloa [T. 46]. Ramos told Cantu that he himself was not able to handle the large amounts of narcotics that Cantu required, but a very close friend of his, who owned a jewelry store in Mexicali, named Isaac Gomez could [T. 47]. Arrangements were then made for Cantu to meet Gomez in Los Angeles the next week [T. 49]. Thereupon the sale of smoking opium referred to in Count Two was consummated [T. 50].

On February 12, 1957, defendant Gomez was introduced to Cantu by Ramos [T. 61]. The following day, while cruising on board a yacht operated by other narcotic agents [T. 67] Gomez offered to deliver forty ounces of heroin to Los Angeles on the week following with a promise of larger quantities thereafter [T. 70]. Details for delivery of the forty ounces were then discussed [T. 71].

The following week, on February 18, 1957, Ramos telephoned Cantu and thereupon put Gomez on the phone [T. 74]. After some discussion Gomez told Cantu "You wait there and I will call you back. I have to talk to some people and I will call you back about 3:00 or 3:30 this afternoon" [T. 76]. On a subsequent telephone conversation that same day [T. 76] Ramos told Cantu that "they" would leave Mexico the following morning with thirty-five ounces of heroin [T. 77]. On February 19, 1957 Ramos called again to state that he and Isaac had not been able to cross the border, that there is "a little trouble down here. It is nothing to worry about. We will be there tomorrow" [T. 78].

On February 20, 1957 Cantu met Ramos in the coffee shop of the Valencia Hotel in Anaheim [T. 80]. Ramos told Cantu and Frank S. Vronek, of the Los Angeles District Attorney's office, that he, Ramos, had brought thirty-five ounces of heroin for delivery but that Gomez was not with him at the time. Gomez had left the same morning from Mexicali "with another person," was going to make a delivery of narcotics in San Fernando, and as soon as he was finished with that was to join them in Anaheim [T. 81].

Cantu thereupon left Ramos and went to his parked government automobile until 5 o'clock when Gomez appeared [T. 82]. Gomez told Cantu to wait until Ramos came by and then follow Ramos in his car [T. 83].

At about 5:30 P.M. Ramos drove up to Cantu's car and said, "Follow me" [T. 85]. At this time Ramos was not wearing a wool jacket which he had previously been wearing when Cantu saw him in the coffee shop [T. 86]. Cantu then followed Ramos' 1950 Chevrolet to the Highway 101 Motel in Orange, California [T. 87]. In the motel Ramos told Cantu that he had only ten ounces of heroin for delivery, that Issac Gomez had told him not to deliver the full thirty-five ounces until he received money for the ten ounces at which time Gomez would give him, Ramos, the remaining twenty-five ounces for delivery [T. 88]. Ramos stated that "the person that was with Gomez now was advising Gomez not to deliver the whole amount until he got some money for the first ten ounces" [T. 89]. Cantu refused to deal on these terms [T. 89] whereupon Vronek and Ramos left the motel at about 6:00 P.M. They returned about 7:00 P.M. [T. 90] whereupon Ramos stated that Gomez would not deal except on the terms previously stated [T. 91]. Ramos said "that the person

that was with Isaac Gomez kept advising Gomez not to deliver" [T. 91]. Ramos said that Gomez had the twenty-five ounces in an automobile in Anaheim [T. 92]. Thereupon Ramos was arrested [T. 93].

Ramos was seen walking east on Center Street in Anaheim at about 3:45 P.M. on February 20, 1957 by William Gilkey, a Narcotic Agent [T. 248]. At that time Ramos was wearing a jacket [T. 255]. At about 4:15 or 4:30 P.M. Ramos was seen by Gilkey talking to Gomez and Padilla on the corner of Center and Los Angeles Streets. Gilkey later saw Ramos with Frank G. Vronek, at the Highway 101 Motel [T. 253]. This was about 6:45 P.M. or 7:00 P.M. and at that time Ramos was not wearing his jacket [T. 255]. Gilkey testified that after Gomez and Padilla had the conversation with Ramos just referred to he observed them entering the two-tone black Buick with a Baja license plate [T. 253]. They drove around Anaheim for about an hour after which the witness lost them due to a car failure [T. 254].

Frank G. Vronek, an investigator for the office of the Los Angeles District Attorney for eleven years [T. 267] testified that on February 20, 1957, he saw the defendant Ramos in the Valencia Hotel coffee shop. Cantu was with Ramos and they conversed in Spanish in his presence for about five minutes [T. 268]. At the conclusion of the conversation Cantu told Vronek to stay with Ramos and left. Ramos was eating some pie and they conversed in English. Ramos said that he was going to leave; that Vronek should wait for him as he was going to meet Isaac and that there was another man with Isaac whom Isaac did not want anyone else to see [T. 269]. He remained in the cafe until Mr. Cantu returned. He also saw Gomez on that day at about 4:40 P.M. He saw

Gomez going out of the driveway of a cafeteria located at the corner of Los Angeles Street and Center Street in Anaheim. The defendant Padilla was with Gomez [T. 271]. He had a brief conversation with Gomez and when this was finished Gomez spoke to Padilla in Spanish after which Padilla left them and walked to a bar on Los Angeles Street. Gomez thereupon crossed Center Street and the witness lost sight of him [T. 272].

An hour later he saw Gomez walking past Agent Cantu's Government vehicle and he called Gomez back to the vehicle [T. 273]. He later saw Ramos about 5:35 P.M. seated in a grey Chevrolet coupe with a Baja, California, plate. He entered the Chevrolet [T. 274]. Ramos was not wearing a jacket at the time, but he had been wearing one about 3:40 in the afternoon when he had previously seen Ramos. At 5:35 P.M. it was cool [T. 276]. They drove to Center Street near Los Angeles Street in Anaheim, parked the vehicle, and Ramos got out looking for Isaac Gomez [T. 277]. The witness then saw Gomez and Padilla on the sidewalk near a barber shop on Los Angeles Street. They were talking [T. 278]. Each of the defendants talked but the witness could not understand the words. Defendant Ramos directed the conversation to Gomez at which time Gomez turned to Padilla and the witness observed Padilla making a motion with his head as if to make a negative answer [T. 280]. Then Ramos returned to the car and said, "Isaac doesn't want to give me the 25 ounces. The other man, he has got a deal, and he is the reason why Isaac doesn't want to deal" [T. 280-281].

Ramos left the car again, and went back and talked to Gomez in the presence of Padilla. Padilla appeared to speak only to Gomez [T. 281]. Ramos then came back,

got into the vehicle and they dove to the Motel. On the way Ramos told the witness that the other man did not want Isaac to go through with the deal, that Isaac wanted the money for the ten ounces that were in the motel and afterwards he would let Ramos deliver the additional 25 ounces. Ramos stated that the 25 ounces were in a jacket that he had been wearing [T. 282] earlier in the day. He said that he had concealed the 35 ounces in between the springs of the seat of the car when they crossed the border; that Isaac and Padilla came in another car; that they had approximately the same amount of carga (a general term meaning narcotics); that they were late on account of taking the other carga somewhere else; that the jacket was then in the possession of Gomez and Padilla and that there was no way of getting to it. Ramos also said that the 25 ounces, in three bundles of 10, 10, and 5 ounces, respectively, were in the pockets of the jacket, and the jacket was in the Padilla vehicle [T. 283].

Ramos said that he and Padilla had had a fight in a Mexicali bar over some woman and that Padilla did not like him and didn't want him to make any money out of the pending deal [T. 284]. The witness returned to the motel room with Ramos where Ramos was arrested.

At about 10:15 that same evening the defendants Gomez and Padilla were arrested by Deputy Sheriff George A. Fullenwider of the County of San Diego [T. 356-358]. Padilla was driving, and Gomez was a passenger in the vehicle [T. 358], a 1950 Buick 4-door sedan with License Number 271262, Baja, California [T. 357]. This vehicle was registered to Cristobal Gonzales Padilla [T. 416].

A coat was found lying in the back seat of this vehicle [T. 396]. This coat, or jacket, Government's Exhibit 5

[T. 397], contained three packets [T. 399] which, in turn contained narcotics [T. 344]. The sum of $2,160 in United States currency was found in the glove compartment of the automobile [T. 400] and Padilla admitted that this money was his [T. 401]. Padilla gave the name Pedro Gonzales Martinez [T. 374], which he admitted was not his true name [T. 703]. He used that name because "that was the name on his passport" [T. 718].

At the conclusion of its case in chief the government moved that all evidence with respect to the acts and declarations of the defendant Ramos on the 20th of February, 1957, and up to the moment of his arrest be received in evidence and considered as to the defendant Padilla; that all of the acts and declarations of the defendant Gomez up to the moment of his arrest be received in evidence as to defendant Padilla; and that all acts and declarations of defendant Padilla be received and considered as to all defendants [T. 422]. The court deferred ruling on this motion until the conclusion of the case, and after having heard all evidence the court granted the motion [T. 1001].

Ramos claimed that he received the 35 ounces of heroin from a Mexican named Ysidro Lopez [T. 539] on the 20th of February [T. 540] and he denied receiving it from Isaac Gomez [T. 541]. He admitted that he brought it across the border [T. 541] to Anaheim in a 1950 or 1951 White Chevrolet which he borrowed from a friend [T. 542]. He claimed he was employed by Ysidro Lopez to bring the heroin to Anaheim and that he was not employed by Gomez or Padilla [T. 543]. He admitted that the coat, Exhibit 5, was his [T. 545]. When he left Mexicali he had the heroin in the seat of his car. There were four different packages of heroin [T. 546]. He put some of the heroin in his coat when he was at the motel.

After he registered at the motel he claimed that he accidentially bumped into Gomez and Padilla on the street in Anaheim [T. 548]. He put the jacket containing three packets of heroin in a light green car which was parked outside the restaurant near where he met Gomez and Padilla. He "did not know who owned the car" but Gomez indicated that he had come up from Mexico in it. After leaving the jacket in the car he just walked away, supposedly leaving approximately $14,000 to $16,000 worth of heroin unguarded in an open vehicle [T. 570-574].

Padilla testified that he wanted to buy a truck in Los Angeles [T. 656]. He had about $2,300 which he took out of his bank, the Banco Mexicana De Occidente [T. 657], and on the 20th of November, 1957, he left for Los Angeles with Isaac Gomez [T. 658]. They left Mexicali about 9:45 or 10:45 a.m. and arrived in Anaheim at about 4:30 p.m. [T. 664], after having stopped at Los Angeles where they arrived about 3 or 3:30 p.m. [T. 665]. He was with Gomez at the restaurant, and then, about 6 p.m. he decided to rent a room. They went to a motel and he rested for about 45 minutes, then left and went to a bar, and thereafter drove around and bought some liquor before they left town for Tiajuana about 8 p.m.

They had come from Mexicali by way of Route 99 but returned to Mexico by way of U. S. Highway 101 [T. 674]. Padilla claimed he decided to return by way of Tiajuana because he had not found a satisfactory truck in Los Angeles and thought that perhaps he might find one in Tiajuana [T. 675]. Padilla admitted that he knew the jacket was there, and he admitted to circumstances which should have caused him to have been curious about the jacket [T. 680], but he denied that he ever investigated the jacket [T. 681], and he denied all knowledge as to narcotics or narcotics transactions [T. 682].

Padilla testified that they looked for the truck, which they had come all the way to Los Angeles to buy, for "5 or 10 minutes" while he was driving around "looking at lots" [T. 695]. He owned a "miscellaneous" store in Mexicali. While in the United States he bumped into Ramos in Anaheim completely by accident [T. 690].

Padilla testified that he withdrew about $1,700 from the Banco Mexicano De Occidente for the purpose of buying the truck [T. 822]. This sum was withdrawn in December of 1956, and was kept in his house [T. 822] after that date, until he came to Anaheim on February 20, 1957.

Although Padilla denied any connection with the sale of the narcotics by Ramos, Government's Exhibit 7, a registration card from the Highway 101 Motel, Orange, California, was found in his glove compartment at the time he was arrested at the border [T. 913-914]. (This was the motel where Ramos had registered and had talked to the narcotics agents.) Padilla admitted that he registered in a motel in Anaheim [T. 697], that the motel was "more or less" the same distance from Anaheim as the other witnesses had previously indicated [T. 698], but he denied that he ever received a card from the motel where he registered [T. 699], and he denied ever having seen Government's Exhibit 7 [T. 700].

The defendant Gomez denied having any connection with any deals pertaining to narcotics, denied all conversations alleged to have been had with the narcotics agents, and denied all knowledge of any narcotics deals whatsoever [T. 743-777].

Gomez' denials of any participation in the narcotics deals were thoroughly impeached by Michael Gullon, a narcotics agent [T. 843-847].

At the conclusion of the trial the court found that the evidence was sufficient to justify the finding that Padilla joined the conspiracy on the 20th of February, 1957 [T. 1000] and that Padilla and Gomez were guilty as to count four [T. 1002]. Each defendant was thereupon taken into custody and bond in the sum of $25,000 as to Gomez and Ramos and $50,000 as to defendant Padilla was exonerated.

D. Statutes Involved.

Each count of the indictment was based upon Title 21, United States Code, Section 174, which provides in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any Territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years.
>
> . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT.

I.

The Evidence Should Be Viewed Most Favorably to the Government.

This court should not weigh the evidence or pass on the credibility of witnesses. Therefore, the convictions should be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-337 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2nd Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1956), *cert. den.* 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), *cert. den.* 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

II.

The Credibility of the Witnesses Was Exclusively for the Trial Court to Determine.

Appellant cites numerous cases to support the premise that the evidence in this record merely casts suspicion upon him and that therefore his conviction cannot stand (Appellant's Op. Br. p. 9). The crux of his argument seems to be that the admitted presence of narcotics in his car at the time of his arrest was, in the words of the statute, "explained to the satisfaction of the jury" by the testimony of himself and his codefendants (*id.,* p. 14).

This argument ignores the very relevant question of credibility, and the record as a whole establishes that the credibility of appellant and each of his codefendants was seriously in question. Upon one very important and relevant matter, Government's Exhibit 7, which circumstantially tied appellant to Ramos by showing that appellant had been a guest in the *same motel* in Orange, California, as had Ramos, appellant was thoroughly impeached [T. 700, 924-925].

The rest of his testimony concerning the business of buying the truck, the withdrawal of the funds from the bank for that purported purpose several months in advance of the trip to the United States, the "5 or 10 minutes" that appellant admitted he had spent looking for the truck, all accumulate to make the testimony of appellant in every material respect a mass of improbabilities and contradictions.

That the question of credibility of the various witnesses is exclusively with the trial court needs no citation of authority. He was entitled to conclude that a witness was telling the truth as to one point, was mistaken as to another, but was truthful as to a third.

> *Elwert v. United States,* 231 F. 2d 928, 934 (9th Cir., 1956).

Appellant who had been impeached could properly be entirely disbelieved.

> *Henry v. United States,* 273 Fed. 330, 338 (C. A. D. C. 1921);
>
> 8 Cyc. Fed. Proc., 176, Sec. 26, 149.

Consequently, the question of the guilt or innocence of appellant was properly decided by the trial court without

particular reference to appellant's "explanation" for the presence of the narcotics in his automobile.

The same rules for testing the credibility of the witnesses apply to appellant's codefendants. The record discloses ample reasons for disbelieving their testimony. Gomez was impeached regarding his version of a conversation that was had in Agent Cantu's automobile [T. 843-847]. Ramos' testimony regarding the circumstances in which he supposedly threw his jacket, with 25 ounces of heroin in the pockets valued at about $14,000 to $16,000 into the back seat of appellant's Buick, supposing that this car was owned by Gomez was, on its face, incredible, improbable, and portions of the testimony were contradictory. The following partial quotation from the record will illustrate:

"The Court: You threw your coat in the back end of the car through the open window?

The Witness: Yes.

The Court: In the coat was three packages of heroin?

The Witness: Yes.

The Court: Without closing the window or locking the car, and you walked away?

The Witness: Yes.

The Court: And you didn't watch the car or your coat or the heroin?

The Witness: No.

The Court: You brought this heroin up to Anaheim to sell, did you not?

The Witness: Yes.

The Court: And how much were you going to get for it?

The Witness: From $14,000 to $16,000.

The Court: And you put the heroin in the back end, on the back seat of the car in your coat worth this much money and walked away and didn't watch it?

The Witness: Yes.

The Court: Did anybody else watch it for you?

The Witness: Not watch it, but those who had brought the car were eating and the car was in front of them, and what I had told them to take care of was my coat.

The Court: Did Isaac say he would watch your coat?

The Witness: Yes.

The Court: Did you tell him what was in your coat?

The Witness: No.

The Court: All right."

And further:

"The Witness: Yes. What I said is that I asked Mr. Gomez if he had brought a car and he told me that was a car that was outside, *but he didn't specify to me who had driven it or who had brought it.*

The Court: Did he point the car out to you?

The Witness: Yes. It could be seen.

The Court: *Did he say it was his car?*

The Witness: *Yes.*"

Based upon the foregoing testimony, it is hardly to be wondered that the trial court rejected appellant's explanation concerning the presence of the heroin in his automobile. In view of this testimony, having regard for the rules governing credibility of the witness, the trial court was free to draw such reasonable inferences as appeared from the evidence and to make such conclusions as were warranted therefrom. This court should likewise consider

all of the inferences which reasonably arise from the evidence in the aspect most favorable to supporting the judgment and findings of the court below.

III.

Appellant's Waiver of Trial by Jury Conferred Jurisdiction on the Trial Court to Try His Case and to Apply and Consider All Presumptions Arising From the Evidence and the Law.

Appellant contends that notwithstanding his waiver of a jury trial the court erred in accepting that waiver because of the use of the word "jury" in the presumption set out in Title 21, United States Code, Section 174 (Appellant's Op. Br. p. 18). He makes no pretense that any objection on this issue was ever interposed at the time of trial. He also concedes (Appellant's Op. Br. p. 19) that the statutory presumption which arises from the unexplained possession of narcotics is "only a rule of evidence."

Appellant further suggests that he doubts the judge had jurisdiction to hear the issue under the statutory presumption because of the "mandatory provisions of the statute." It appears however that he has misapplied the operation of the word "mandatory." As used in the statutory presumption the word applies to the *defendant* and not to the judge, for, once the possession of heroin has been proved this "*shall* be deemed sufficient evidence to authorize conviction" unless the defendant comes forward with a satisfactory explanation.

The presumption concerns itself solely with procedure. It deals exclusively with a rule of evidence. It makes proof of one fact *prima facie* evidence of a related fact.

> *Valasquez v. United States,* 244 F. 2d 416, 418 (C. A. 10th, 1957).

The Court: And you put the heroin in the back end, on the back seat of the car in your coat worth this much money and walked away and didn't watch it?

The Witness: Yes.

The Court: Did anybody else watch it for you?

The Witness: Not watch it, but those who had brought the car were eating and the car was in front of them, and what I had told them to take care of was my coat.

The Court: Did Isaac say he would watch your coat?

The Witness: Yes.

The Court: Did you tell him what was in your coat?

The Witness: No.

The Court: All right."

And further:

"The Witness: Yes. What I said is that I asked Mr. Gomez if he had brought a car and he told me that was a car that was outside, *but he didn't specify to me who had driven it or who had brought it.*

The Court: Did he point the car out to you?

The Witness: Yes. It could be seen.

The Court: *Did he say it was his car?*

The Witness: *Yes.*"

Based upon the foregoing testimony, it is hardly to be wondered that the trial court rejected appellant's explanation concerning the presence of the heroin in his automobile. In view of this testimony, having regard for the rules governing credibility of the witness, the trial court was free to draw such reasonable inferences as appeared from the evidence and to make such conclusions as were warranted therefrom. This court should likewise consider

all of the inferences which reasonably arise from the evidence in the aspect most favorable to supporting the judgment and findings of the court below.

III.

Appellant's Waiver of Trial by Jury Conferred Jurisdiction on the Trial Court to Try His Case and to Apply and Consider All Presumptions Arising From the Evidence and the Law.

Appellant contends that notwithstanding his waiver of a jury trial the court erred in accepting that waiver because of the use of the word "jury" in the presumption set out in Title 21, United States Code, Section 174 (Appellant's Op. Br. p. 18). He makes no pretense that any objection on this issue was ever interposed at the time of trial. He also concedes (Appellant's Op. Br. p. 19) that the statutory presumption which arises from the unexplained possession of narcotics is "only a rule of evidence."

Appellant further suggests that he doubts the judge had jurisdiction to hear the issue under the statutory presumption because of the "mandatory provisions of the statute." It appears however that he has misapplied the operation of the word "mandatory." As used in the statutory presumption the word applies to the *defendant* and not to the judge, for, once the possession of heroin has been proved this "*shall* be deemed sufficient evidence to authorize conviction" unless the defendant comes forward with a satisfactory explanation.

The presumption concerns itself solely with procedure. It deals exclusively with a rule of evidence. It makes proof of one fact *prima facie* evidence of a related fact.

> *Valasquez v. United States,* 244 F. 2d 416, 418 (C. A. 10th, 1957).

In a non-jury trial the judge is the trier of facts and it is his duty to weigh the evidence in the same manner as a jury would, including all presumptions.

89 C. J. S. 383, Sec. 593.

Thus, it is not surprising that in the only reported case wherein the question of the interchangeability of the word "judge" for the word "jury" has come up the Court of Appeals for the State of California concluded that the statutory word "jury" referred to the finder of fact whether that be the jury, or the judge.

Nathanson v. Murphy, 132 Cal. App. 2d 363, 373, 282 P. 2d 174, 181.

In any case, the presence of heroin in appellant's car, when taken with other evidence in the case, sufficiently established appellant's guilt without reference to the statutory presumption. So the error of the court, if any, in failing to force a jury upon appellant at the time he waived trial by jury, was non-prejudicial.

IV.

The Evidence Sufficiently Established the Guilt of Appellant Under Count Four of Receiving, Transporting, Concealing and Facilitating 25 Ounces of Heroin.

Since the trial court could not believe the explanation given by appellant and his codefendants for presence of 25 ounces of heroin found in appellant's car at the border, it was free to draw such inferences from the evidence, aside from the explanation, as were warranted.

The fact that appellant had these narcotics in his possession at the time of his arrest constituted sufficient evidence to authorize conviction.

Title 21, U. S. C., Sec. 174.

The fact of possession is proved by establishing that the defendant had dominion and control over the narcotics and had knowledge of their presence. Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof.

People v. Antista, 129 Cal. App. 2d 47, 276 P. 2d 177;

United States v. Pinna, 229 F. 2d 216, 218 (7th Cir.);

Evans v. United States, 257 F. 2d 121, 128 (9th Cir.).

Here it is clear that the appellant had complete dominion and control over the narcotics which were found in his car. Their presence in the car provides an inference that he knew of their presence; the circumstances under which the jacket was placed in the vehicle make it highly probable that it was placed there either at his direction, or at least with his consent; the presence of Government's Exhibit 7, the card from Highway 101 Motel, in appellant's glove compartment inextricably links him to Ramos to the extent that it must be concluded appellant at least had knowledge of Ramos' activities; and finally, the fact that appellant used an admittedly false name at the border at the time of his arrest tends to show some guilty knowledge on his part.

Appellant's use of a false name at the time of his arrest tended to indicate guilty knowledge on his part.

22 C. J. S. 962, Sec. 627.

Taking into account all of the evidence, the inferences and presumptions to be drawn therefrom, it is submitted that appellant's guilt was established by substantial evidence and should be sustained.

V.

The Evidence Sufficiently Established the Guilt of Appellant Under Count Five of Conspiracy to Import and Sell Narcotics.

The nature of the unlawful venture, being, as it is, usually covertly planned, allows great latitude in drawing proper inferences from direct and circumstantial evidence to show the existence of the conspiracy. It is well established that:

> "participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances."
>
> *Glasser v. United States,* 315 U. S. 60, 80.

To the same effect:

> *United States v. Manton,* 107 F. 2d 834, 839 (C. A. 2d);
>
> *Curley v. United States,* 160 F. 2d 229, 236 (C. A. D. C.);
>
> *Marino v. United States,* 91 F. 2d 691 (C. A. 9th), cert. den. 302 U. S. 764.

Furthermore the conspiracy is not to be dismembered and viewed in its separate parts, but only by looking at the evidence as a whole. As has been stated:

> "The character and effect of a conspiracy are not to be judged by dismembering it and viewing it in its separate parts, but by looking at it as a whole . . .; and in a case like the one before us the duty of the jury was to look at the whole picture and not merely at the individual figures in it."
>
> *Carlson, et al. v. United States,* 187 F. 2d 366, 371 (10th Cir.).

A conspiracy is a secret, furtive crime and by its very nature, must usually be proved by circumstantial evidence.

Ryan v. United States, 99 F. 2d 864 (8th Cir.);
Rose v. United States, 149 F. 2d 755 (9th Cir.).

This is true because ordinarily only the results of a conspiracy, and not the private plotting and promoting are observed.

Rose v. United States, supra, page 759.

The step between innocent knowledge and guilty intent and agreement may be, and is usually shown by, prolonged and interested cooperation, indicating a "stake in the venture."

Van Huss v. United States, 197 F. 2d 120, 121 (10th Cir.).

It is, of course, elementary that every act or declaration of each member of a conspiracy in furtherance thereof, and while the conspiracy is in operation, is considered the act and declaration of each member of that conspiracy.

Barnett v. United States, 171 F. 2d 721 (9th Cir., 1949).

The *corpus delicti, an unlawful agreement to deal in heroin,* may be proved by circumstantial evidence.

United States v. DiOrio, 150 F. 2d 938 (3rd Cir., 1940);
Demmick v. United States, 116 Fed. 825 (9th Cir.).

Once the *corpus delicti* has been proved, then it is proper to admit evidence or declarations of the co-conspirators.

Sandez v. United States, 239 F. 2d 239, 244 (9th Cir., 1956).

The evidence is not consistent with any other finding except guilt when it is viewed as a whole. Appellant, who came to this country on a "business" visit, coincidentally meets Ramos, a countryman, in Anaheim. Ramos is supposedly on a separate "business" visit to this country. Ramos and Gomez are observed speaking together in the presence of appellant on several occasions. Immediately after each conversation Ramos' actions vary, depending upon what he was instructed to do on each occasion. These several conversations, and Ramos' actions throughout the day, are only consistent with the conclusion that there is a common purpose, rather than that the parties met coincidentally while on separate business. Finally, appellant is found to have in his possession at the time of his arrest, a card showing that he had been a guest at the Highway 101 Motel. This is the same motel from which Ramos had negotiated throughout the day in an attempt to complete the sale of the total of 35 ounces of narcotics that was involved. Ten ounces of the narcotics are in Ramos' possession at the time of his arrest; 25 ounces, in packets of 10, 10, and 5 ounces, respectively, are found in appellant's automobile at the time of appellant's arrest, in just the condition that Ramos said they would be, in one of his frequent declarations. The trial court has concluded that the declarations, and not the testimony of the parties, were truthful; that the development and collocations of circumstances established a common purpose or plan; and that this was for the sale of 35 ounces of heroin.

Conclusion.

1. The evidence was sufficient to convict appellant on Count Four.

2. The evidence was sufficient to convict appellant on Count Five.

3. The judgment below should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE W. KELL,
Assistant U. S. Attorney,

Attorneys for Appellee.